No. 76-227

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

PACIFIC FM, INC., D/B/A RADIO STATION K-101,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The National Labor Relations Board found that during a union organizational campaign petitioner ("the Company") violated Section 8(a)(1) of the Labor Management Relations Act, 61 Stat. 140, 29 U.S.C. 158(a)(1), by threatening employees with loss of employment if they selected the Union to represent them. Specifically, the Company told an employee that if the Union were selected by the employees, it would say "no" to any proposal that the Union brought before it; threatened to withhold severance pay from an employee if that employee filed a charge with the Board; and coercively interrogated an employee concerning his union sympathies (Pet. App. 19-28, 59-60). The Board also found that the Company violated Section 8(a)(3), as amended, 29 U.S.C. 158(a)(3),

by discharging two employees because of their organizational activities on behalf of the Union (Pet. App. 28-35, 56-58, 59).

Before the Administrative Law Judge, the Company contended, *inter alia*, that one of the discharged employees, Mark Provost, was a supervisor within the meaning of the Act and therefore not subject to its protections. The Law Judge rejected the Company's contention and found that Provost was an employee under the Act[1] (Pet. App. 47-51).

Following the unfair labor practice hearing, but prior to issuance of the Law Judge's decision, this Court announced its decision in *National Labor Relations Board* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267. The Company's exceptions to the Law

[1]The Law Judge relied on the following facts: Provost, who was hired in 1969, was one of three on-the-air newsmen employed at the Company's San Francisco radio station. His duties required him to prepare newscasts from wire service reports, newspapers and other sources, and to present his reports on the air. On May 1, 1970, Provost was given the title of news director. His duties as news director, however, were not specified to him and he thereafter continued working his regular shift and performing his accustomed duties (Pet. App. 35-36). His salary continued at the same level; it was less than some other on-the-air broadcasters and significantly less than that of an admitted supervisor, whose equal the Company asserted Provost to be. Unlike the admitted supervisors, Provost did not have his own office or designated work space (Pet. App. 36-37). Provost processed applications for employment, but had no authority to hire or fire (Pet. App. 37-43). Provost did not give other newsmen assignments or direct their work (Pet. App. 43, 47). When Provost complained to Company President Gabbert that another newscaster was not doing his share of the work, Gabbert said it was none of Provost's concern (Pet. App. 44). On another occasion, Gabbert, in the presence of other newscasters, stated that Provost was taking his title of news director too seriously and said, "[w]hy can't Mark get it through his head that he is news director in name only" (Pet. App. 45).

Judge's decision, relying on that case, alleged, *inter alia*, that Provost was a managerial employee and therefore was not entitled to the Act's protections against discriminatory discharge.

In its decision and order, the Board stated that it had considered the record and the Law Judge's decision "in light of the exceptions, the motions, and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order" (Pet. App. 2).

The court of appeals in a memorandum decision upheld the Board's decision and enforced its order (Pet. App. 65-68). It specifically rejected the Company's assertion that the Board failed to consider its objection concerning Provost's alleged managerial status.

2. Petitioner's sole contention is that the Board improperly found Provost to be an employee without stating its reasons for rejecting the Company's belated contention[2] that he was a managerial employee.

The court of appeals' decision sustaining the Board's procedure and holding the Board's determination to be supported by substantial evidence on the record is correct and raises no issue warranting review by this Court. Contrary to petitioner's contention, the Board determined all relevant issues. As the court of appeals pointed out (Pet. App. 67-68):

[2]*Bell Aerospace, supra*, was decided after the parties' post-hearing briefs were submitted to the Law Judge, but *before* his decision issued. The Company never requested of either the Law Judge or the Board that the hearing be re-opened or the case remanded for the judge to consider the managerial status issue. Rather, it argued in its exceptions that the credited evidence, in the light of *Bell Aerospace*, warranted a finding that Provost was a managerial employee.

> The Board examined and rejected the respondent's objections which were directed to the "managerial employee" issue and the Administrative Law Judge's lack of a specific finding to the effect that Provost was not a manager. Having examined the record, we have determined that each finding critical to a determination of non-managerial status does in fact appear; all Provost's duties were determined to be of such a nature as to make him only an employee. The failure to contrast an employee with a manager is not fatal to the findings when there is substantial evidence supporting the conclusion that Provost was an employee. * * * The credited testimony and the Judge's findings were clearly antithetical to managerial status.

Thus there is no basis for petitioner's claim that the court of appeals encroached upon the Board's primary jurisdiction to determine the question of managerial status. Nor was the Board required to set forth a detailed ruling on each of petitioner's exceptions. As stated in *American President Lines, Ltd.* v. *National Labor Relations Board*, 340 F. 2d 490, 492, in which the Ninth Circuit rejected a similar contention:

> The order showed the ruling of the Board on the exceptions presented. The Board's order sufficiently informed petitioner of the disposition of all of its exceptions. We are unconvinced that petitioner suffered any prejudice because the Board did not make separate rulings on each exception and state the reasons for such rulings.[3]

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[3]Accord: *Borek Motor Sales, Inc.* v. *National Labor Relations Board*, 425 F. 2d 677, 681 (C.A. 7) (collecting cases), certiorari denied, 400 U.S. 823; *National Labor Relations Board* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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General Counsel,
National Labor Relations Board.

OCTOBER 1976.